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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-622

KENNETH A. BODE, ET AL., *Petitioners,*

v.

NATIONAL DEMOCRATIC PARTY, ET AL., *Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on September 30, 1971, reversing the ruling of the United States District Court for the District of Columbia that the formula adopted by the Democratic National Committee for apportioning delegate votes at the 1972 Democratic National Convention is discriminatory, without rational basis and unconstitutional.

## OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet reported, and the findings of fact, conclusions of law and order of the District Court, which are also not yet reported, appear in the appendix, pp. 25 to 42, *infra*.[1]

## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit were entered September 30, 1971. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment permit the Democratic National Committee to allot delegates to a convention which nominates the Democratic Presidential and Vice Presidential candidates by an apportionment formula never explained or justified and giving primary weight to the Electoral College strength of each state rather than its Democratic voter constituency.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions which this case involves are as follows:

ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States of America.

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[1] On October 12, 1971, certiorari was denied in *Georgia* v. *National Democratic Party, et al.*, No. 71-272, a case in which plaintiffs prayed for a declaratory judgment that state population is the only permissible basis for apportioning national party convention votes. As demonstrated *infra*, pp. 12 to 16, the decision of the panel in *Georgia* is in substantial conflict with the decision of the panel under review here.

He shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

## Amendment XII

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; —The President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.

### AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### AMENDMENT XXIII

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

## STATEMENT OF THE CASE

The Democratic Party has allocated delegates to the 1972 Democratic National Convention on a substantially malapportioned basis not reflecting the actual Democratic support in the several states and permitting delegates representing a minority of the nation's Democratic voters to select the Party's Presidential nominee. The constitutionality of the challenged malapportioned base for a Presidential nomina-

tion presents an issue of national significance properly resolved only by the highest court of the land. Before proceeding to urge that reason and others for grant of the writ, we review the genesis and operation of respondents' malapportioned formula and the questionable rationale for its validation which the Court of Appeals has espoused.

### 1. The Formula Adopted by the Democratic National Committee

On February 19, 1971 at a meeting of respondent Democratic National Committee, the following formula was adopted for the apportionment of delegate votes at the 1972 Democratic National Convention:

(i) *Electoral College:* "Each State and the District of Columbia shall receive three Convention votes for each of the Electors from that State or the District of Columbia in the Electoral College" (1614 votes, representing approximately 54% of the total).

(ii) *One-Democrat-One-Vote:* The remainder of 3000 votes (1386 votes, representing approximateiy 46% of the total) are to be apportioned on the basis of the average Democratic voting strength in the states in the past three Presidential elections.

(iii) *Territories:* 16 delegate votes are apportioned among Puerto Rico (7), Guam (3), Canal Zone (3), and the Virgin Islands (3).

### 2. How the Formula Came To Be Adopted

The irrationality of combining "electoral-vote-times-three" delegates with "one-Democrat-one-vote" delegates in the 54-46% ratio utilized by the Democratic National Committee is the outgrowth of the irregular

procedures followed by the Committee (see affidavit of Kenneth A. Bode, dated May 21, 1971):

The 1968 Democratic National Convention adopted a resolution calling for the establishment of a Commission on Rules. One of its main assignments was to recommend to the Democratic National Committee a new apportionment formula to be used for allocating delegates to the 1972 Democratic National Convention. The Democratic National Committee implemented the Convention action by creating the Rules Commission under the chairmanship of Congressman James G. O'Hara.

The O'Hara Rules Commission met during 1969 and 1970 in numerous cities around the country and solicited the views of interested Democrats. At no time during this lengthy period was the formula ultimately adopted by the Democratic National Committee ever proposed to or discussed by the O'Hara Commission. On February 16, 1971, the O'Hara Commission made its final decision and recommendation—an apportionment formula distributing delegate votes 50 percent on the basis of previous Democratic vote in the state and 50 percent on state population. While that particular rejected formula is not before the Court, no rational basis was ever presented for the O'Hara Commission's apples-and-oranges combination.

At any rate, heeding complaints from the smaller states concerning the O'Hara Commission formula, the Chairman of the Democratic National Committee assigned to a previously appointed ad hoc committee the responsibility for working out the Call to the 1972 Convention, including the apportionment of delegates. On February 17, 1971, a wholly new formula—never

presented to or considered by the O'Hara Commission—was devised by the ad hoc committee. This formula, as already indicated, grants three Convention votes for each electoral vote and allocates the remainder of the 3000 votes on the basis of one-Democrat-one-vote, determined by the average Democratic vote in the three previous Presidential elections. On February 18, 1971 the Executive Committee of the Democratic National Committee adopted the formula devised by the ad hoc committee. However, several members of that Committee opposed the formula and specifically the manner in which it had been derived, stating:

> "[The formula] is so totally without justification that none has ever been attempted. The entire rationale of this formula is that it provides benefit to one group of states . . . We feel compelled to note that the formula being recommended to you today has never received serious consideration by any *representative* Party body. In all the public hearings of the O'Hara Commission, it was never suggested. In the lengthy paper prepared by the academic consultant, it goes unmentioned. In the hours of deliberations by that Commission it seems to have occurred seriously to not one person. Certainly the discussion among the members of the Executive Committee centered much more on the propriety of even considering such a recommendation than on its merits . . .".

On the following day, February 19, 1971, the Democratic National Committee voted down six alternative proposals, including the O'Hara Commission proposal and a pure one-Democrat-one-vote proposal, and accepted the ad hoc committee's formula. Three weeks later this suit was filed.

### 3. Petitioners' Suit Challenging the Apportionment Formula

Petitioners are prominent and representative members and officers of the Democratic Party from New York, California, Connecticut, and the District of Columbia, and organizations supporting political reform in general.[2] They filed this action in the United States District Court for the District of Columbia, alleging that although the apportionment of 46% of the delegate votes on the basis of Democratic party strength is a constitutionally valid standard, the apportionment of the remaining votes on an Electoral College norm is arbitrary and irrational, and deprives petitioners and other Democrats of their Fourteenth Amendment right to equal representation at the 1972 Democratic National Convention.

Petitioners alleged that as a consequence of apportioning delegates on Electoral College strength, the votes of Democrats in certain states are debased in comparison to the votes of Democrats in other states.

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[2] Petitioners are Kenneth A. Bode, individually and as Director and on behalf of the Center for Political Reform; John F. English, individually and as Democratic National Committeeman from the State of New York; Shirley Chisholm, individually and as Democratic National Committeewoman from the State of New York; John Burns, individually and as Chairman of the State Democratic Party of New York; Stephen Reinhardt, individually and as Democratic National Committeeman from the State of California; Carmen Warschaw, individually and as Democratic National Committeewoman from the State of California; Charles Manatt, individually and as Chairman of the State Democratic Party of California; Bruce Terris, individually and as Chairman and on behalf of the District of Columbia Democratic Central Committee; Joseph Duffey, individually and as National Chairman and on behalf of the Americans for Democratic Action; Jerry Finkelstein, individually and as Chairman of the New York City Democratic Committee; Daniel G. Collins, individually and as Chairman and on behalf of the New York Democratic Coalition; Howard Samuels, William Samuels.

For example, measured by past Presidential voting—respondents' own method of determining Democratic Party strength in the 46% Democratic strength element of their formula—in 1972 Democrats in Alaska will have greater convention voting power than Democrats in Massachusetts by a ratio of 4.24 to 1 (Complaint, paragraph 35). A Democrat in Alaska will have 3.98 times the power of a Democrat voting in the primary in New York and 3.58 times the power of a Democrat voting in the primary in California (Complaint, paragraph 35). Thus while each delegate from Alaska represents only 3,652 Democrats, each delegate from Massachusetts will represent 15,499 Democrats, from New York 14,534, and from California 13,088 (Complaint, paragraph 34).

Nor are these discrepancies as between the states merely haphazard—instead they reflect a systematic discrimination in favor of the smaller states and against the larger (see *infra,* n. 5, p. 13). That discrimination is hardly surprising in view of the fact that the Democratic National Committee which adopted it is itself incredibly malapportioned against the larger states.[3] Indeed, the present system makes possible the selection of the Party's Presidential nominee by delegates from smaller states representing only a minority of the Democrats throughout the nation (Complaint, paragraph 39). In sum, as the Complaint alleges, "the formula chosen by the Democratic National Committee on February 19, 1971 is chosen on no Constitutionally permissible basis" (Complaint, paragraph 40).

There being no disputed material questions of fact, both sides moved for summary judgment.

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[3] Each state and territory has two voting members on the Committee. Thus Nevada has the same voting power as New York, Guam the same as California.

**4. The District Court's Decision**

Following oral argument on the cross-motions for summary judgment, District Judge June L. Green made the following conclusions of law (*infra*, pp. 27-28):

> 1. The issue of the constitutional validity of delegate apportionment to a Convention nominating a President and Vice President is clearly justiciable in light of the Supreme Court apportionment decisions. *Baker* v. *Carr*, 369 U.S. 186 (1962); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Gray* v. *Sanders*, 372 U.S. 368 (1963); *Hadley* v. *Junior College District*, 397 U.S. 50 (1970). Cf. *Terry* v. *Adams*, 345 U.S. 461 (1953); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); *Williams* v. *Rhodes*, 393 U.S. 23 (1968). The method of nomination and election for practically all offices in the land has now been declared justiciable; it would be an anomaly to refuse to apply constitutional standards for equal protection when it comes to the nomination for the highest office in the land.
>
> 2. The formula for delegate apportionment adopted by the Democratic National Committee is both discriminatory and without rational basis. The analogy to the Electoral College System is inapposite. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Gray* v. *Sanders*, 372 U.S. 368 (1963). The formula, therefore, violates the United States Constitution.

On the basis of these conclusions, Judge Green issued an Order declaring that the delegate apportionment formula adopted by the Democratic National Committee is discriminatory, without rational basis, and unconstitutional; enjoining respondents from utilizing such formula as the basis of delegate apportionment at the 1972 convention; and declaring that the appropriate constitutional method of apportionment is a

formula based on the number of Democratic voters voting in one or more immediately preceding Presidential elections (*infra*, p. 28).

### 5. The Court of Appeals' Decision

The Court of Appeals reversed the District Court. It agreed that "the decision made by the Democratic Party at the national level, here challenged, is tantamount to a decision of the States acting in concert and therefore subject to constitutional standards applicable to state action" (*infra*, p. 32), and that "judicially manageable standards . . . are not lacking to guide judicial decision" (*infra*, p. 32). But it ruled on the merits that, although the nominating process is an " 'integral part' of the elective process" (*infra*, p. 34), "an individual's voice at the convention is more removed from an individual's vote at a previous or subsequent election" (*infra*, p. 35).[4] Pointing out that this Court had reserved decision on whether an analogy to the Electoral College system would justify deviations from the equal representation standard in the case of nominating conventions (*Gray* v. *Sanders*,

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[4] It is difficult to determine exactly what consequence the Court below attaches to its thought that the individual voter's voice at a nominating convention is "more removed" than his direct-ballot participation in an election. But surely, one can find no mandate for malapportionment in that consideration. On the contrary, the fact that the Democratic voter electing convention delegates is not personally a participant at the nominating convention makes it even less justifiable that his Presidential preference should be negated by malapportioned overweighting of delegate seats from other states. The Court's inference that at nominating conventions Equal Protection applies only in some diluted fashion creates a wholly unjustified sanctuary for malapportionment in the process of selecting Presidential nominees. This constitutional dilution largely undercuts the Court of Appeals' finding of justiciability.

372 U.S. 368, 378, n. 10), the Court of Appeals decided that the Electoral College analogy "is permissible not merely because it has constitutional status in national elections, but because in the context of a national party nominating process it has independent rationality to support its use" (*infra,* p. 40). Though all parties in this case had agreed that prior Presidential voting is the appropriate measure of Democratic strength in the various states, the Court ruled that "to identify and count potential Democrats is impossible, requiring desirable but unavailable clairvoyance" (*infra,* p. 36). Finally, the lower court upheld representation at the convention of territorial citizens, who are ineligible to vote in national elections, because of their "interest . . . in who are to be the candidates for their President and Vice President, notwithstanding they have no vote in the election" (*infra,* p. 42).

It is difficult to distill a coherent rationale from the Court of Appeals' rambling discussion of the basic issue; but its ruling appears to rest chiefly upon the following passage of the opinion (*infra,* p. 35-36), concerning "the individual to be represented" at a party's Presidential nominating convention:

> "Appellees would define such individual as one who cast an anonymous vote for the Democratic Presidential candidate in an earlier year. It seems to us that the constituency represented at a national convention does not comprise solely 'Democrats,' so defined. To the extent that a voter, whether he be a registered Democrat or Republican, third party adherent or independent, is given alternative slates by the two major parties, he has a stake in the outcome of the nominating process of both parties. Accordingly, the con-

> stituency for a national convention comprises to a certain degree the entire electorate."

From its view that "the constituency represented at a national convention does not comprise solely 'Democrats'" but "to a certain degree the entire electorate", the Court of Appeals proceeds to its holding that Democratic voting strength is not the constitutionally mandatory test of delegate apportionment at a Presidential nominating convention. Relying on its entire-electorate-constituency postulate, the Court validates use of state population [5] in the formula apportioning delegate strength at a national Party convention:

> ". . . we think the party may resort to the Article II analogy in apportioning 54% of the delegates without infringing the Equal Protection Clause . . . In the arena of Presidential politics, the

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[5] While the court below treated apportionment by Electoral College strength as equivalent to apportionment based on state population, it is, of course, obvious that the Electoral College formula is even a debasement of the population formula. By adding the two United States Senators in determining each state's representation, the voting strength of residents of smaller states is systematically inflated at the expense of voters in larger states. For example, strictly on the basis of population five states (Alaska, Delaware, Nevada, Vermont, and Wyoming) have only one representative in the House of Representatives. However, by adding the two Senators their representation in the Electoral College is tripled, while the increase in representation for larger states by the addition of the two Senators is miniscule. Thus, in the Electoral College each elector from Alaska represents 100,724 persons, while each elector from California represents 443,403 persons—a ratio of 4.4 Californians for each Alaskan. Accordingly, use of the Electoral College distribution as the primary element for apportioning Democratic convention delegates is not even justifiable as an approximation of state population, which the Electoral College formula badly distorts.

> primary function of a national party convention . . . is to select among a field of available persons Presidential and Vice-Presidential candidates most competent to perform the duties of office, yet capable of attracting a sufficient number of popular votes to carry the requisite number of States in the election" (*infra,* p. 40).

In sharp contrast with the entire-electorate-constituency premise of the Court of Appeals' decision is the decision by another panel of the same Court in *Georgia,* wherein this Court recently denied certiorari (No. 71-272). There the court below (Judges McGowan, Tamm and Robb) ruled as follows concerning the use of population for apportioning delegate votes at the 1972 Democratic National Convention:

> "... the imposition of a population-based criterion would constitute a departure from the *equal representation* standard underlying the reapportionment cases. While population may be an appropriate measuring rod when public officials are to be elected and held responsible to the entire citizenry, population alone is an inappropriate test of representation in the framework of national politics where parties compete for membership. Although both major parties are constantly striving to garner a greater share of the voting population's support, neither has yet been so successful as to permit it to claim representation of the entire population. The constituency of each party is significantly smaller than the whole of the eligible electorate, and varies dramatically from state to state and from election to election. For this reason it has never heretofore been thought that (with rare exceptions in one-party states) any delegate to a National Convention could fairly claim to speak for *all* the voters from his jurisdiction. Quite to the contrary, his constituency, if he may be said to represent a constituency, is composed

> only of the voters within his state who are of like political persuasion. Indeed, responsible representation may require that a delegate vote for a candidate as his party's nominee whose views are diametrically opposed to the political persuasion of large segments of the population within the delegate's home state.
>
> "The fallacy in appellants' position lies in their misplaced reliance on cases in which local, state or national officials were elected to perform governmental functions on behalf of the entire electorate in a particular locale. [footnote omitted] In the political party context, however, the primary function performed by a delegate to a National Convention is to participate in a process leading to the designation of a candidate for national office—a prerogative he exercises on behalf of only a portion of the total local population."

Obviously there is the sharpest contrast between the present ruling that *"the constituency for a national convention comprises to a certain degree the entire electorate,"* and the holding in *Georgia* that, far from acting *"on behalf of the entire electorate in a particular locale"*, the delegate in choosing a Democratic candidate acts *"on behalf of only a portion of the total local population."*

Indeed, the fact noted in *Georgia* that "the constituency of each party is significantly smaller than the whole of the eligible electorate, and varies dramatically from state to state" underscores the illogic of any rationale that the entire electorate is the constituency for a party's Presidential nominating convention. In adopting that rationale, the decision below argues (*infra,* p. 36) that since registered members of one party can vote for another party's Pres-

idential nominee all have "a stake in the outcome of the nominating process of both parties." But that argument would distort the essence of the distinction between primaries and general elections. Heretofore the salient distinction between the general election wherein all voters choose public officials and the nominating process whereby parties select candidates has been precisely the difference between the general electorate and the party supporters. While the delegate at a Democratic convention may want to appeal also to Republican voters in his choice of a Presidential nominee, that hardly makes Republicans a part of his constituency. To the extent Democrats are concerned to nominate candidates who will win Republican votes a fairly apportioned one-Democrat-one-vote convention can achieve that result no less than a malapportioned one. And it must finally be noted that the "entire electorate" postulate is at best a judicial afterthought, for it was neither reflected in the proceedings leading to adoption of the present Democratic Convention apportionment nor even in respondents' briefs in the courts below.

* * * * *

It is in the context of the irregular procedures used to arrive at the formula under attack, the irrational and discriminatory nature of the formula itself, and the dubious rationale adopted below, that petitioners seek this writ of certiorari on an issue patently appropriate for resolution by this Court.

## REASONS FOR ALLOWANCE OF WRIT

(1) *The application of the Equal Protection Clause to apportionment of delegates to a party's Presidential nominating convention presents an important*

*question of federal law which has not been*[6]*, but which should be, settled by this Court.* The boundary between the permissible and the forbidden in the nomination of candidates for the nation's highest office should certainly emanate from the nation's highest Court. Whatever the constitutional rule is to be, it appears almost self-evident that only this Court can and should prescribe it. Accordingly, we might go no further, and we set forth the additional reasons below only because of an abundance of caution.

(2) *There is conflict with the applicable decisions of this Court in the lower court's implication that the Equal Protection Clause applies with less force to national party nominating conventions than it does to federal, state, or local elections and primaries.* In order to prevent the "debasement of a citizen's right to vote", this Court has applied Fourteenth Amendment apportionment standards to the selection of a United States Senator and other statewide officers, *Gray* v. *Sanders,* 372 U.S. 368 (1963); United States Congressmen, *Wesberry* v. *Sanders,* 376 U.S. 1 (1964); state

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[6] Indeed, the court below was at pains to demonstrate that this Court has never ruled upon the underlying question whether the Electoral College analogy could "have some part in the allocation of delegates to a national convention", and sought only to distinguish rather than to rely upon this Court's apportionment rulings (*infra,* pp. 38-40). Actually, while the Electoral College provisions (Art. II, § 1 and Amendments XII and XXIII) contain no specific reference to the Presidential nominating process, this Court has held that analogies to the Electoral College system cannot justify deviations from the equal representation requirement (*Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Gray* v. *Sanders,* 372 U.S. 368 (1963)) and that the Equal Protection Clause fully applies to the Presidential electoral process except for the weighted voting at the final stage of the election which is specifically mandated by Article II, § 1 (*Williams* v. *Rhodes,* 393 U.S. 23 (1968)).

legislators, *Reynolds* v. *Sims*, 377 U.S. 533 (1964); county government officials, *Avery* v. *Midland County*, 390 U.S. 474 (1968); and even representatives in special function districts, *Hadley* v. *Junior College District*, 397 U.S. 50 (1970). In all such elections, the Fourteenth Amendment requires no less than equality of representation of all voters:

> "Since 'equal representation for equal numbers of people [is] the fundamental goal' . . . the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. See Reynolds v. Sims, 377 U.S. 533, 577 (1964)." *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 530-531 (1969).[7]

Moreover, this Court has held that the Equal Protection Clause and its one-man-one-vote requirement applies to the nominating process. *Gray* v. *Sanders*, 372 U.S. 368 (1963). It is beyond comprehension how, consistent with this Court's clear holdings that the Constitution requires equal representation in primaries (*Nixon* v. *Herndon*, 273 U.S. 536 (1927), *Nixon* v. *Condon*, 286 U.S. 73 (1932), *Smith* v. *Allwright*, 321 U.S. 649 (1944), *Gray* v. *Sanders*, 372 U.S. 368 (1963), and in other indirect party nominating mechanisms (*Terry* v. *Adams*, 345 U.S. 461 (1953)), the nomination of a Presidential candidate at a national party convention should warrant an exception from the rule of equality.

(3) ***Even if the lower court were correct in its rejection of the one-Democrat-one-vote rule, its failure***

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[7] Indeed, *Kirkpatrick* rejected Missouri's argument that there is a percentage population variance small enough to be considered "de minimis", holding that the Constitutional command to "provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Id.* at 531.

*to explicate the tolerance limits of malapportionment at a Presidential nominating convention calls for this Court's corrective clarification.* Since the Court of Appeals decision says what the rule of equality does not require but leaves obscure what it does require, the Democratic Party can not know whether any or all of the seven delegate apportionment formulae which were considered at its February 19, 1971 meeting can be utilized for future conventions. The Republican National Party cannot know whether its 1972 convention formula, which includes a complex 'bonus vote' scheme, is constitutionally acceptable. State political parties cannot know whether the formulae they have adopted for selecting delegates to the national conventions (a question which is currently being litigated)[8] are constitutionally acceptable. Logically, if as the Court of Appeals below held, the national convention delegate votes can be apportioned among the states on a basis other than equality, then within states representation in the nominating process can also be apportioned on a basis other than equality.

Possibly as good an example as any of the absence of guidelines for the future in the decision below lies in the degree to which the Court of Appeals is permitting use of the Electoral College as the basis of delegate apportionment. Nowhere is there the slightest negation that 100% utilization of the Electoral College formula, as well as 54 percent, would be valid. One hundred percent use of the Electoral College formula would increase the distortion so that each Democrat participating in the selection of national convention delegates in Alaska would have 9.5 times the voting strength of a Democrat voting in the delegate primary

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[8] See, for example, *Maxey* v. *Washington State Democratic Committee*, 319 F. Supp. 673 (W.D. Wash. 1970), *appeal docketed*, No. 71-1051 (9th Cir. 1971).

in Massachusetts. The ratio would be 8.2 to 1.0 between a Democrat in Alaska and one in New York and 6.6 to 1.0 in California. If indeed, as the lower court has held, departures are permissible at Presidential nominating conventions from the one party member-one vote principle, at the very least clarification by this Court is required of the limits of distortion permissible under the Equal Protection Clause.

(4) *The lower Court is constitutionally in error in its refusal to apply the one-Democrat-one-vote principle to the 1972 Democratic Convention.* All apart from the manifest need for this Court's authoritative resolution of issues concerning the nomination of candidates for the nation's highest office, the conflict with this Court's previous decisions, and the constitutional uncertainties left by the lower court's ambiguous ruling, this Court should also grant review because the decision below validates a constitutionally impermissible result. To begin with, the Constitutional necessity for a one-Democrat-one-vote principle at a Presidential nominating convention is underscored by the fact that the entire nominating process under existing state law focuses upon and is restricted to participation by Democrats.[9] If Democrats alone can

[9] In 48 states participation in the processes by which parties select delegates to national nominating conventions is restricted by law to party adherents (see Appendix B to plaintiffs' "Points and Authorities" in the District Court). To vote in Presidential or delegate primaries, or participate in party meetings or caucuses one must be an enrolled party member. See, e.g., S.H.A. (Ill.) ch. 46, 87-43 (1965); 21 Maine R.S.A. § 241.6 (1965). Similarly, to run for convention delegate, one must be an enrolled member of the party. See, e.g., N.J. S.A. 19: 24-4 (1964). Moreover, only persons statutorily enrolled as members of a political party may appear as candidates on its Presidential primary ballot. See, e.g., S.H.A. (Ill.) ch. 46, § 7-11 (1970 Supp.).

run for delegate and if Democrats alone can vote for delegates, there is no possible justification for allocating national convention delegates on any basis other than Democrats. As Mr. Justice Stewart stated in his concurring opinion in *Gray* v. *Sanders,* 372 U.S. 368, 382 (1963), "Within a given constituency [Democrats], there can be room for but a single constitutional rule—one voter, one vote." The admitted distortions in relative voting strength of individual Democrats in the different states (p. 9, *supra*) is many times the imbalance permitted by this Court's holdings.

Moreover, petitioners argued to the court below that no rational basis had ever been suggested for the final compromise of political expediency adopted by the Democratic National Committee. No one has ever given any reason for the three-delegates-per-electoral-vote part of the formula nor explained why only the remainder of 3000 delegates should go on a basis of one Democrat, one vote. No one has explained why the formula could not better have been two delegates-per-electoral-vote or four or even five.[10]

In simplest terms, the three delegates-per-electoral-vote ratio was adopted so as not to "offend the sensibilities of the smaller states" (Transcript of February 19th meeting, p. 133). Indeed, it is not too much to suggest that what we have here is a compound political

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[10] Actually, a proposal was made for five delegates-per-electoral-vote by one of the small-state members of the Committee when it was considering the recommendations of the ad hoc committee. With unusual candor, the National Committeeman argued:

> "How about us taking some multiple of the electoral votes in each state. That is not one man, one vote, of course, but neither are any of the rest of these" (Transcript of February 19th meeting, p. 99).

compromise. First came the O'Hara compromise which proved unsatisfactory to the smaller states. Then the ad hoc committee proposed a new and additional compromise which was adopted by the Democratic National Committee. But "[p]roblems created by partisan politics [here small state demands] cannot justify an apportionment which does not otherwise pass constitutional muster." *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 533 (1969). A formula not based on "some rational policy" cannot stand. *Swann* v. *Adams,* 385 U.S. 440 (1967).

As we have previously shown (*supra,* pp. 12-16), the court below found a rational policy here on the basis of its dubious "entire electorate" theory which was recently cogently refuted by another panel's decision in the *Georgia* case. The court below was apparently also led astray by its misconception of petitioners' contention. Petitioners' constitutional standard is allocation of delegates on the basis of *Democratic Party strength* in each State and the District of Columbia. Because the Democratic National Committee has itself measured Democratic Party strength (the 46 percent) by the average Democratic vote in three past Presidential elections, and because petitioners deemed that a rational and reasonable method of measuring Democratic strength, petitioners accepted that as the method of measurement. But that method of measuring Democratic strength is not an immutable constitutional norm; petitioners' proposed constitutional standard is Democratic Party strength and the method of measuring such strength may vary. For example, if the infusion of younger voters could somehow create a distortion by widely varying the pre-existing percentages of party adherence in the different states, this would cer-

tainly be an appropriate consideration for modifying a measurement formula based on one or more past Presidential votes.[11] But certainly a formula of measurement is not difficult to find—the Democratic National Committee found one in "three-past-Presidential-elections," the states admit only Democrats in the choice of delegates, and surely there is no mystery in estimating Democratic Party strength for purposes of delegate allocation.

## CONCLUSION

This Court has reviewed the applicability of the Equal Protection Clause of the Fourteenth Amendment to apportionment of state legislatures, apportionment of congressional districts, primary voting for a statewide candidate, representation in county government, and even representation in a special function district. It would seem at least as appropriate

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[11] Similar modification already exists in the present Democratic National Committee formula. In Alabama and the District of Columbia, the Democratic National Committee based representation on Democratic vote in *two* previous presidential elections instead of three previous elections, the standard used for 49 states. In 1960, residents of the District of Columbia were not enfranchised to vote for president; therefore, the representation accorded Democrats from the District which is based on prior Democratic vote is calculated on the basis of the elections of 1964 and 1968. Voters in Alabama had no opportunity to vote for electors pledged to the nominees of the Democratic National Convention in 1964; therefore, the representation based on prior Democratic vote in that state is calculated on the basis of the elections of 1960 and 1968. Where such modification is necessary to assure equitable representation to all Democrats, it constitutes a rational and appropriate basis for modifying the three past elections test of Democratic adherence in the state. In the case of new youthful voters, registration figures could be used as an additional factor.

for this Court to prescribe the constitutional norms which apply in the choice of nominees for the highest office in the land.

Respectfully submitted,

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## APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 540-71

KENNETH A. BODE, ET AL., *Plaintiffs*,

v.

NATIONAL DEMOCRATIC PARTY, ET AL., *Defendants*.

**Findings of Fact, Conclusions of Law and Order**

### FINDINGS OF FACT

1. This is an action seeking a judicial declaration that the delegate apportionment formula adopted by the Democratic National Committee for the 1972 Democratic National Convention is unconstitutional; seeking an injunction preventing the use of that delegate apportionment formula at the 1972 Democratic National Convention; and seeking a further declaration that the appropriate constitutional apportionment formula is one based upon the number of Democratic voters voting in one or more immediately preceding Presidential elections. The delegate apportionment formula under attack is that adopted by the Democratic National Committee on February 19, 1971: Of the 3016 convention votes, 1614 votes (almost 54%) are distributed on the basis of 3 convention votes for each of the Electors from a State or the District of Columbia; 1386 convention votes (almost 46%) are distributed on the basis of the Democratic vote in the last 3 Presidential elections; and 16 convention votes (½%) are distributed among Puerto Rico and the territories.

2. Plaintiffs include the highest officials of the Democratic Parties of New York and California whose Democratic constituents will be underrepresented in the nomination of candidates for President and Vice President at the 1972 Democratic Convention if the February 19, 1971 formula is utilized, and various organizations and individuals interested in political reform and democratic procedures.

3. Defendants are the National Democratic Party, the Democratic National Committee, the Chairman of the Committee, Lawrence F. O'Brien, and the Treasurer, Robert S. Strauss.

4. This Court has jurisdiction over this action and the parties hereto.

5. Plaintiffs have filed a Motion for Summary Judgment and defendants have filed a Motion to Dismiss and for Summary Judgment. There are no disputed issues of fact.

6. *Justiciability.* The constitutionality under the 14th and 5th Amendments of the United States Constitution of the apportionment of delegates to the Democratic National Convention where the nominees of that Party are chosen is a justiciable issue. There exist judicially manageable standards for apportionment of delegates; this is reinforced by the agreement of the parties on the past three Presidential elections as an appropriate measure of Democratic voters.

7. *State Action.* The persons nominated at the Democratic National Convention for the offices of President and Vice President are entitled under the laws of practically all the states and the District of Columbia to have their names placed on the General Election Ballot. In addition, in each of the 50 states and the District of Columbia, the selection of delegates to the Democratic National Convention is governed by state law in either (a) the election of such delegates in primaries regulated by state law, (b) the election of such delegates in state or district conventions, which conventions are regulated by state law, or whose members are chosen in primaries regulated by state law, or whose members are chosen by persons chosen in primaries regulated by state law, or (c) the selection of such delegates by party organizations created and/or subject to regulation by state law.

8. *Discrimination.* The formula for delegate apportionment adopted by the Democratic National Committee on February 19, 1971 is discriminatory in that Democrats in

different states have different voting power in the choice of delegates to the Convention. Under the Democratic National Committee formula, a Democrat in Alaska who participates in that state party's processes for the selection of delegates to the National Convention has a greater voting power than a Democrat participating in the Democratic Party primary for the selection of delegates in Massachusetts by a ratio of 4.24 to 1.0. The same Democrat in Alaska has 3.98 the power of a Democrat voting in the primary in New York, 3.58 the power of a Democrat voting in the primary in California, and 2.82 the power of a Democrat voting in the primary in the District of Columbia. Each delegate from Alaska will represent only 3,652 Democrats while each delegate from Massachusetts will represent 15,499 Democrats, from New York 14,534 Democrats, from California 13,088 Democrats, and from the District of Columbia 10,312 Democrats. Furthermore, the defendants have not presented any rational basis for the formula adopted by the Democratic National Committee on February 19, 1971.

9. Plaintiffs will be irreparably injured by the apportionment formula adopted by the Democratic National Committee.

## CONCLUSIONS OF LAW

1. The issue of the constitutional validity of delegate apportionment to a Convention nominating a President and Vice President is clearly justiciable in light of the Supreme Court apportionment decisions. *Baker* v. *Carr,* 369 U.S. 186 (1962); *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Wesberry* v. *Sanders,* 376 U.S. 1 (1964); *Gray* v. *Sanders,* 372 U.S. 368 (1963); *Hadley* v. *Junior College District,* 397 U.S. 50 (1970). Cf. *Terry* v. *Adams,* 345 U.S. 461 (1953); *Moore* v. *Ogilvie,* 394 U.S. 814 (1969); *Williams* v. *Rhodes,* 393 U.S. 23 (1968). The method of nomination and election for practically all offices in the land has now been declared justiciable; it would be an anomaly to refuse to apply constitutional standards for equal protection when it comes to the nomination for the highest office in the land.

2. The formula for delegate apportionment adopted by the Democratic National Committee is both discriminatory and without rational basis. The analogy to the Electoral College System is inapposite. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Gray* v. *Sanders*, 372 U.S. 368 (1963). The formula, therefore, violates the United States Constitution.

## ORDER

This case came on for oral hearing on the Complaint, Plaintiffs' Motion for Summary Judgment, Defendants' Motion to Dismiss and for Summary Judgment and the papers in support thereof and all parties having been fully heard, it is ordered as follows:

1. Plaintiffs' Motion for Summary Judgment is granted and Defendants' Motion to Dismiss and for Summary Judgment is denied.

2. The Court declares that the apportionment formula adopted by the Democratic National Committee on February 19, 1971 to be used at the 1972 Democratic National Convention is discriminatory, without rational basis and unconstitutional.

3. The Court enjoins defendants National Democratic Party, Democratic National Committee, Lawrence F. O'Brien and Robert S. Strauss from utilizing the apportionment formula adopted by the Democratic National Committee on February 19, 1971 as the basis for delegate apportionment to the 1972 Democratic National Convention.

4. The Court declares that the appropriate constitutional method of apportionment is a formula based on the number of Democratic voters voting in one or more immediately preceding Presidential elections.

June L. Green
U.S. District Judge

June 22, 1971

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1536

KENNETH A. BODE, INDIVIDUALLY AND AS DIRECTOR AND ON BEHALF OF THE CENTER FOR POLITICAL REFORM, ET AL.

v.

NATIONAL DEMOCRATIC PARTY, ET AL., *Appellants*

Appeal from the United States District Court
for the District of Columbia

Decided September 30, 1971

*Mr. Joseph A. Califano, Jr.*, for appellants.

*Mr. William Josephson*, with whom *Messrs. Joseph L. Rauh, Jr., John Silard* and *Elliott C. Lichtman* were on the brief, for appellees.

*Messrs. Arthur K. Bolton*, Attorney General, State of Georgia, *Harold N. Hill, Jr.*, Executive Assistant Attorney General, and *Robert J. Castellani*, Assistant Attorney General, filed a brief on behalf of The State of Georgia as *amicus curiae*.

Before FAHY, *Senior Circuit Judge*, and ROSS and WILKEY, *Circuit Judges*.

FAHY, *Senior Circuit Judge:* The District Court has held in this case that the appropriate constitutional method of apportionment of delegates to the 1972 Democratic National Convention is by a formula, to quote the language of the order, "based on the number of Democratic voters voting in one or more immediately preceding Presidential elections." In so ruling, the court also held that the delegate allocation formula recently adopted by the Democratic National Committee—hereinafter the Committee—is discriminatory, without rational basis, and unconstitutional. Appropriate injunctive relief was entered to implement the

decision. We are unable to agree with these rulings and accordingly we reverse.[1]

The formula adopted by the Committee provides for the allocation of a ceiling of 3,016 votes as follows: 1,386 (46% of 3,000) of the delegates are apportioned on the basis of each State's average Democratic voting strength in the last three Presidential elections, and 1,614 (54% of 3,000) of the delegates are apportioned to the States and the District of Columbia[2] on the basis of a multiple of three times their respective electoral college strength. The remaining 16 delegates are divided among the territories of Puerto Rico, the Canal Zone, the Virgin Islands and Guam.[3] Ap-

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[1] The case originated as a complaint for declaratory and injunctive relief. It was decided on cross-motions for summary judgment and defendants' motion to dismiss, the court granting the plaintiffs' motion.

The plaintiffs-appellees, in addition to Kenneth A. Bode, who sues individually and as Director on behalf of the Center for Political Reform, include the Democratic National Committeemen and Committeewomen of the States of New York and California, the Chairman of the District of Columbia Democratic Central Committee, other Democratic Party officials, the National Chairman of the Americans for Democratic Action and the Chairman and representative members of the New York New Democratic Coalition. The defendants, now appellants, are the National Democratic Party, the Democratic National Committee, and the Chairman and Treasurer of the Democratic National Committee.

[2] As a matter of convenience in composition our use of the words "State" and "States" will include the District of Columbia.

[3] This formula is the result of an overhaul of the structure of the National Democratic Party initiated at the 1968 National Convention. The Convention created the O'Hara Commission to examine, *inter alia*, the delegate allocation system as it had evolved up to 1968. In 1971 the Democratic National Committee met to determine the most effective method of distributing convention delegates among the States. To this end six formulae were considered. Ultimately, the formula developed by the O'Hara Commission, as modified by the Executive Committee of the Democratic National Committee, and as explained in the text, was unanimously adopted.

pellees do not question the upper limitation on the aggregate number of delegates, except they would eliminate the 16 as not representative of those entitled to vote and would apportion the remaining 3,000, as the District Court held to be the appropriate constitutional method, among the States according to demonstrated party strength. The theory upon which the court rested its decision is that the one man, one vote rule recognized in the reapportionment cases following *Baker* v. *Carr*, 369 U.S. 186 (1962), applies to the allocation of convention delegates among the States on the basis of "one Democrat, one vote." Presumably, the District Court thought that allocation of delegates on any other basis would result in disproportionate representation of Democrats from different States. The manner in which the delegates allotted to each State are selected within the State is not challenged, only the basis on which the allotment to the States has been made by the Committee.

## I

Appellees, as did the court below, deem their position to be required by the provision of the Fourteenth Amendment that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and by the decisions of the Supreme Court interpreting this provision in the reapportionment cases. A threshold condition to the application of the Equal Protection Clause is that the challenged action be that of a State. Plaintiffs in *The State of Georgia, et al.* v. *The National Democratic Party, et al.*, — U.S. App. D.C —, — F.2d — (1971), challenged the delegation allotment of the 1972 National Conventions of both the Democratic and Republican Parties as violative of the Equal Protection Clause because not based solely on population in conformity with the one man, one vote standard Pointing to the Supreme Court decisions holding that state action was involved in the methods by which state political parties nominate candidates for local or national

office,[4] the *Georgia* court reasoned that state action was no less present when a state political party selects delegates to the party's national convention. The court then said:

> [I]f the action of the individual state parties in selecting delegates to participate in the presidential-nominating process constitutes state action, the collective activity of all the states' delegates at the national convention can be no less readily classified as state action.

We accordingly hold, following *Georgia*, that the decision made by the Democratic Party at the national level, here challenged, is tantamount to a decision of the States acting in concert and therefore subject to constitutional standards applicable to state action.[5]

Beyond the question of state action lies another preliminary condition to the application of the equal protection standard, that of justiciability. On that question, the issues in the present case cannot be distinguished from those in *Georgia* that were held to be justiciable. Although, as we shall see, policy considerations are here involved as they were in *Georgia*, nevertheless, "judicially manageable standards," *Baker* v. *Carr*, *supra*, at 226, are not lacking to guide judicial decision. The "courts are competent to scrutinize the allocation schemes promulgated by the national parties in order to determine whether, given the context of political partisanship out of which such formulas necessarily arise, substantial deviations from equality of voting power at the Conventions are supported by legitimate justifications." *Georgia*, *supra* at —.

Absent unconstitutional classifications based on race, religion, sex or economic status, deviations from mathematically precise equality of voting power may be allowed to

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[4] *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953).

[5] We need not enlarge upon the additional reasons assigned in *Georgia* for reaching the same conclusion.

further some reasonable countervailing policy, *Swann* v. *Adams*, 385 U.S. 440, 444 (1967); *Abate* v. *Mundt*, 403 U.S. 182 (1971). Measuring against such standards set by the Supreme Court, the court in *Georgia* held that delegate allocation based solely on state population is not allowed by the Equal Protection Clause, as claimed by appellants in that case. In so holding, however, the court explicitly avoided passing on the validity of apportionment based solely on demonstrated party strength,[6] a question before us to which we now turn.

## II

In order to avoid discrimination violative of the Equal Protection Clause we do not find it to be essential that the party allocate convention delegates to States in proportion to the number of Democratic voters voting in the respective States in one or more preceding Presidential elections.[7] The District Court, holding otherwise, thought that the reapportionment decisions of the Supreme Court, resting upon the one man, one vote formula, protecting from "debasement or dilution of the weight of a citizen's vote," *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964), require the convention delegates to be apportioned on a one Democrat, one vote basis.

In *Reynolds* the Court elaborately explains the reasons for the one man, one vote principle:

> [E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies.

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[6] The plaintiffs-appellees in the present case filed in *Georgia* a motion to intervene or, in the alternative, to participate as *amici curiae*. The latter motion was granted because of the considerable overlap of issues raised by both cases. Denial of the motion to intervene was based on the court's view that this case was dissimilar in important respects. *Georgia*, *supra*, at ——.

[7] Sometimes herein referred to as "party strength."

The Court continued,

> Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his State legislature.

*Id.* at 565.

There is no doubt that the allocation among the States of delegates to a party national convention is subject to the equal protection requirements of the Fourteenth Amendment. We are not prepared to hold, however, that the only constitutionally acceptable formula for such allocation is one based solely on prior party strength—one Democrat, one vote. The argument for applying such a criterion to delegate allocation begins by assuming, rightfully, that the nominating process at a national party convention is an "integral part" of the elective process. Appellees argue further that the convention must provide those who are there represented an equal voice as tantamount to the equal vote guaranteed by the reapportionment cases. In appellees' view this would insure that the ultimate vote would be more than a rubber stamp of a decision made by delegates without regard for the wishes of those who appellees say should be represented at the convention. To implement their theory, appellees would allow only "Democratic" representation at the national convention; and to determine the number of "Democrats" in each State entitled to representation appellees would look to an average of the number of votes cast for the Democratic Presidential nominee in the three immediately preceding Presidential elections. None of the Supreme Court decisions, however, has passed upon a contention comparable to the one thus advanced; and we think none requires such a rigid formula.

The Equal Protection Clause, as we have indicated above, embraces within its protection proceedings intimately con-

nected with the progression of the elective process. It prohibits, for example, racially-motivated exclusion of eligible voters from primaries, *Nixon* v. *Herndon,* 273 U.S. 536, 1927), and *Nixon* v. *Condon, supra;* the weighting of primary votes in favor of sparsely-populated counties, *Gray* v. *Sanders,* 372 U.S. 368 (1963); and the requirement of geographical support in petitions by independent candidates for placement on the ballot, *Moore* v. *Ogilvie,* 394 U.S. 814 (1969).[8] Yet in all cases dealing with apportionment, or candidate-sorting through primary or petitioning procedures, it is the franchise that is protected from debasement or dilution. In such cases not only is there a clear correlation between the citizen's vote and the procedure being challenged, but those entitled to representation are, under any of several constitutional definitions of population,[9] readily ascertainable.

In the case before us, however, though the demands of the Equal Protection Clause must be met, an individual's voice at the convention is more removed from an individual's vote at a previous or subsequent election. Nor is the individual to be represented identifiable except in a loose, conceptual sense. Appellees would define such individual as one who cast an anonymous vote for the Democratic Presidential candidate in an earlier year. It seems to us that the constituency represented at a national convention does not comprise solely "Democrats," so defined. To the extent that a voter, whether he be a registered Democrat or Republican, third party adherent or independent, is

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[8] *Cf. Gomillion* v. *Lightfoot,* 364 U.S. 339, 342 (1960). Likewise the Fifteenth Amendment, which applies with equal force against racial discrimination in the elective process, prohibits a racially-motivated bar to participation in primaries, *Smith* v. *Allwright, supra,* and from voter canvassing tantamount to a primary, *Terry* v. *Adams, supra.*

[9] *See, e.g., Burns* v. *Richardson,* 384 U.S. 73 (1966); *cf. Davis* v. *Mann,* 377 U.S. 678 (1964).

given alternative slates by the two major parties, he has a stake in the outcome of the nominating process of both parties. Accordingly, the constituency for a national convention comprises to a certain degree the entire electorate.[10] By viewing the constituency of the Democratic National Convention in this way, the application of appellees' theory —that the allocation of delegates must be based on past performance—could theoretically result in a failure to represent, or at best, in an underrepresentation, of those who might wish to nominate and vote for a nominee different from the one ultimately selected at the convention. To identify and count potential Democrats is impossible, requiring desirable but unavailable clairvoyance. Elusive too is the utilization of past voting patterns—transitory political phenomena—to ascertain the current population to be represented at a national convention.[11] As we shall see from our discussion of the Committee plan in Part III, *infra*, none of the Supreme Court decisions involving the fundamental position that political power resides in the people, and is to be equally distributed among the qualified voters, requires a single convention formula as decreed by the District Court. True it is that the nominating power may not be removed so far from population control as seriously to impair the right of the qualified voters to influence the choice of candidates for whom they eventually will have an opportunity to vote. But the maintenance of

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[10] When this court stated in *Georgia, supra* at ——, that the "constituency of each party is significantly smaller than the whole of the eligible electorate, and varies dramatically from state to state and from election to election," the context shows that the court used the term constituency in the sense of adherents. This does not mean that the *Georgia* court viewed a national convention as representative only of avowed party members, or even of voters who in the past voted for one particular party nominee.

[11] It is impossible to determine accurately who, among those who will vote in the 1972 election, voted Democratic in previous elections. This defect in the formula adopted by the District Court is enlarged by the unknown political adherence of millions of newly-enfranchised voters of 18 through 20 years of age.

this situation does not require the court to go so far as to bind a national political party in its nominating councils to listen solely to voices allotted on a mathematical calculation of previous party strength in the respective States, with only a slight tolerance of variation which might be overlooked, but which does not depart from the stated criterion. No invidious discrimination is necessarily incident to departing from so rigid and, indeed mathematically uncertain, a formula. That this is so we think becomes clear when we consider whether the Committee plan is itself valid under the Equal Protection Clause.[12]

## III

The Committee plan allocates 46% of the delegates to the States on the basis of past party strength in each State.[13] As we hold in Part II, the Fourteenth Amendment does not require this basis to the exclusion of all others. Nor is it contended that the Fourteenth Amendment prohibits its use in part. Aside from the 16 delegates allotted to the territories, the contest as framed by appellees revolves around that aspect of the Committee formula which provides for the allocation of 54% of the delegates on the basis of a multiple of three times the electoral college strength. The tripling of the number is not questioned, only the use of the collegiate principle.

Under Article II of the Constitution, the electoral college is composed of members from each State equal in number to the Senators and the Representatives in the House to

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[12] Appellees refer also to the Due Process Clause, but advance no contentions not encompassed by those based upon the Equal Protection Clause.

[13] The language of the Committee plan is more precise than the order of the District Court in articulating the formula for calculating the Democratic population of the States. Party population is defined by the Committee as the average of the count of votes cast for the Democratic Presidential candidate at the last three Presidential elections. The District Court order states the population as the number of "Democratic voters voting" at one or more immediately preceding elections.

which the State is entitled. The number of Representatives depends upon State census population. The electoral college composition stemmed from the Great Compromise of the 1787 Constitutional Convention, which afforded each State two Senators, regardless of population. The Compromise met the objections of the less populous States to a distribution of national political power solely on a population basis notwithstanding the federated character of the new nation, formed of sovereign States.

In a variety of situations, but none of national scope like the present, which have come before the Supreme Court in the reapportionment cases, the Court has not approved the electoral college analogy as permitting a departure from a strict population basis for the distribution of voting power. The cases include the election of members of a state legislature [14] and members of the United States Senate.[15] In rejecting the use of the analogy to weight more heavily the rural vote in state legislature elections, the Court in *Reynolds, supra,* contrasted the federated character of the nation with a State's relation to its own political subdivisions. Because such subdivisions are non-autonomous creatures of the State, whereas the nation was formed by sovereign States voluntarily coming together as a nation, the electoral college analogy was deemed inappropriate to justify departing from the fundamental theory of our government as resting upon the right of the people to elect their governors by casting equal votes.[16]

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[14] *Gray* v. *Sanders, supra; Davis* v. *Mann, supra.*

[15] *Gray* v. *Sanders, supra.*

[16] The Court in rejecting the philosophy underlying the electoral college as justification for diluting votes cast in heavily populated state legislative districts, stated:

> Passage of the Fifteenth, Seventeenth, and Nineteenth Amendments shows that this conception of political equality belongs to a bygone day, and should not be considered in determining what the Equal Protection Clause of the Fourteenth Amendment requires in statewide elections.

*Gray* v. *Sanders, supra* n.8.

The Court has never held, however, that it is an impermissible departure from this fundamental theory to permit the electoral college analogy to have some part in the allocation of delegates to a national convention which is to nominate candidates, not for state or county offices, but for President and Vice President, whose very elections are to be made by the electoral college.[17] Nor has the Court foreclosed such a plan. Thus, in *Reynolds* the Court quoted from *Gray* as follows:

> We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued.[56]

[56] 372 U.S., at 378.

377 U.S. at 574-75. The Court in *Reynolds,* however, omitted from the *Gray* quotation footnote 10 that qualifies the word "conventions." The footnote was not repeated in *Reynolds* because not pertinent there, but it is pertinent to this case. It reads:

> [10] We do not reach the questions that would be presented were the convention system used for nominating candidates in lieu of the primary system.

372 U.S. at 378. Though the disclaimer no doubt has reference to a state convention system for nominating state

[17] The exception is that if there is not a majority vote in the electoral college for any of the candidates, then the election is to be made by the House of Representatives under the provisions of Article XII of the Constitution.

candidates, all the more it encompasses a convention system for nominating candidates for President and Vice President; for while state action is involved in such nominations, *Georgia, supra*, a national nominating convention is the instrumentality of the action. In this situation we think the party may resort to the Article II analogy in apportioning 54% of the delegates without infringing the Equal Protection Clause. The analogy is permissible not merely because it has constitutional status in national elections, but because in the context of a national party nominating process it has independent rationality to support its use.

In *Irish* v. *Democratic-Farmer-Labor Party of Minnesota*, 287 F. Supp. 794, 805 (D. Minn. 1968), the court noted the function of a political party in the United States:

> [A] primary function of a political party in a democracy is the direction and control of the struggle for political power among men who may have contradictory interests and often mutually exclusive hopes of securing them. This the parties do by institutionalizing the struggle and emphasizing positive measures to create a strong and general agreement on policies.

In the arena of Presidential politics, the primary function of a national party convention, as suggested by the *Irish* court, is to select among a field of available persons Presidential and Vice-Presidential candidates most competent to perform the duties of office, yet capable of attracting a sufficient number of popular votes to carry the requisite number of States in the election. This process of sorting and unification requires a judgment exercised toward maintaining and enlarging party appeal on a national scale.[18] In making this judgment the Democratic National Committee has decided to allot to the States 46% of the dele-

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[18] *See* Note, One Man, One Vote and Selection of Delegates to National Nominating Conventions, 37 U. Chi. L. Rev. 536, 552-56 (1970). *Compare* Bellamy, Applicability of Fourteenth Amendment to the Allocation of Delegates to the Democratic National Convention, 38 Geo. Wash. L. Rev. 892 (1970).

gates to the 1972 convention on the basis of prior party strength, and, except for the 16 allotted to the territories, to allot the remaining 54% to the States under the electoral college standard of distribution. Except for the number attributed to Senators the electoral college standard is itself one of state pouplation, which of course includes the party strength. Appellees do not demonstrate that the admixture of representation in the convention thus accomplished would bring about a dilution or debasement, violative of the Equal Protection Clause, of the vote of any qualified voter in the 1972 election for President and Vice-President, or would invidiously deprive any qualified voter of a legal right to greater representation in the convention than is accorded by the Committee plan.[19] Moreover, the plan cannot be held on the basis of any data submitted to the court to concentrate power in the convention on so unrepresentative a basis as to cause the candidates to fail to give the electorate an opportunity, insofar as the nominating process is involved, to govern themselves through the exercise of the right to vote. We accordingly hold that the Committee plan would not deprive any person by state action of the equal protection of the laws.

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[19] In a number of situations the Supreme Court has permitted exceptions to the one person, one vote formula. In *Gordon* v. *Lance*, 403 U.S. 1 (1971), some deviation was allowed in respect to incurring bonded indebtedness and certain tax increases; in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), and *Burns* v. *Richardson*, *supra*, exception was allowed in the composition of a state legislature by the use of multi-member districts; and it was allowed in the election of a county board of supervisors in *Abate* v. *Mundt*, *supra*. Although we hold that by reason of the nature of a national party convention the one man, one vote standard is not required to be followed in its composition, the above cases demonstrate other situations in which it has not been required when deviation was incident to the effectuation of some rational policy.

## IV

As to the 16 delegates distributed among the territories, aside from the *de minimus* argument, we uphold it as an appropriate recognition of the interest of the territorial citizens in who are to be the candidates for their President and Vice President, notwithstanding they have no vote in the election.

We are unable to accept the ruling of the District Court that the apportionment formula adopted by the Committee is discriminatory, without rational basis, and unconstitutional, and that the appropriate constitutional method of apportionment is a formula based on the number of Democratic voters voting in one or more immediately preceding Presidential Elections.

*Reversed and remanded with directions that the motion of defendants in the District Court for summary judgment be granted.*